No. 94-947

In The

Supreme Court of the United States

October Term, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., AND AMERISTAFF PERSONNEL CONTRACTORS, LTD.,

Respondents.

On Writ Of Certiorari To the United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of Court.

the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation.[2]

This case presents the fundamental question of whether the National Labor Relations Act ("NLRA" or "the Act") requires an employer to consider for hire paid union agents who have been sent by the union to seek employment with the employer for organizational purposes and who, if hired, will remain with the employer only so long as the union permits them to do so. The resolution of this issue presents, *inter alia*, the question of whether these paid union agents are "employees" as defined by Section 2(3) of the NLRA, 29 U.S.C. § 152(3). The Board held that Respondents, as employers, must hire such individuals, despite the fact that their employment was, by agreement with the union, only for organizational purposes, their salary would be subsidized by

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[2] *See, e.g., Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068 (1994); *ABF Freight Sys., Inc. v. NLRB*, ___ U.S. ___, 114 S.Ct. 835 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

the union, and the duration of their employment would be determined by the union. The Eighth Circuit Court of Appeals rejected the Board's position as an unreasonable interpretation of the Act and held such paid union organizers to be outside of the NLRA's definition of "employee."

The Court's resolution of this matter is of vital concern to the Chamber and its members, many of whom are non-unionized companies that are receiving employment applications from paid union organizers whose primary interest in gaining employment is not to work for the companies, but to organize their workforces for the benefit of the union. These employers need to know whether they must consider such paid union organizers as legitimate job applicants whom they must hire and retain in their workforce as the Board held, or whether they need not be treated as *bona fide* employees or applicants because of their union-employer's control over them.

SUMMARY OF THE CASE

Respondent, Town & Country Electric, Inc. ("Town & Country"), is a Wisconsin-based electrical contracting company. Malcolm Hansen, a Minnesota State licensed journeyman electrician, is a member of Local 292 of the International Brotherhood of Electrical Workers ("Local 292" or "the union"). In September of 1989, Local 292, acting pursuant to its "job salting organizing resolution," encouraged Hansen and some nine other Local 292 members to seek jobs on a non-union Town & Country project

in International Falls, Minnesota. According to the resolution, members of the Local who received approval from the union could seek jobs on non-union projects, like Town & Country's, for the purpose of "organizing the unorganized." Members who were successful in obtaining such employment were required to "promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification [by the union]." In return for the organizers' efforts, the union had to pay them the difference between union scale and the non-union contractor's wage rate, and also had to pay for the organizers' travel expenses.

On September 7, 1989, Hansen, accompanied by approximately nine other Local 292 members and two full-time paid union officials, went to a hotel in Minneapolis, Minnesota, where Town & Country officials were scheduled to interview applicants who had been pre-screened by Ameristaff, an employment agency.[3] None of the individuals from Local 292 had been pre-screened for interviews, although Hansen had called Ameristaff on the morning of September 7 and had been instructed to go to the hotel.

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[3] Shortly after being awarded the contract in early September, 1989, Town & Country learned that Minnesota law requires electrical contractors to employ one State-licensed electrician for every two on the job site who lack such licenses. Because Town & Country had no employees who met this requirement, it retained Ameristaff to recruit personnel for the job. Those recruited would be employees of Ameristaff, not Town & Country. Local 292 officials learned of the job through an advertisement placed by Ameristaff.

Town & Country's representatives for these interviews, human resources manager Ron Sager and project manager Dennis Defferding, were delayed in Wisconsin by inclement weather, and arrived at the hotel in Minneapolis one and one-half hours late. By the time they arrived, of the seven pre-screened interviewees, only one remained, along with the dozen applicants sent by the union. Sager and Defferding interviewed one union applicant, who stated that he had to leave early, and the one scheduled applicant who had remained. They then informed the others, whom their applications showed to be union members, that Sager had to return to Wisconsin for an important meeting and that only scheduled applicants would be interviewed. Hansen, however, demanded to be interviewed because he had been told that morning by Ameristaff to come to the hotel. Sager then interviewed Hansen and, although knowing that he was a union member, hired him. Hansen thus became an Ameristaff "employee."

On September 12, Town & Country's crew, including Hansen, began work at the site. The same day, Hansen announced to the crew that he was there to organize them for the union. Thereafter, Hansen's crewmates complained to their foreman about Hansen's workplace behavior, including his organizing efforts and his poor productivity.

On September 14, Town & Country learned that Minnesota law prohibits electrical contractors from using employment agency employees on the job. Hansen was therefore informed by his foreman that he was terminated, and his request that he be hired by Town & Country was refused. The union thereupon filed unfair labor

practice charges against Town & Country, alleging that the Company violated Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(3), by refusing, on September 7, to interview the two union officials and the other union members sent by Local 292, and by refusing to retain Malcolm Hansen on the job after September 14.

The Board found in favor of the union in all respects. In so doing, the Board adhered to its view that under the NLRA paid union organizers, although dispatched to a targeted employer for the express purpose of fulfilling organizational responsibilities to the union while in the guise of *bona fide* employees, are indistinguishable from any other job applicant or employee. The Board accordingly concluded that a targeted employer, like Town & Country, may not refuse to hire such union agents or dismiss them for engaging in paid organizing activity at the employer's worksite. The Eighth Circuit, citing with approval the Fourth Circuit's decision in *H.B. Zachry v. NLRB*, 886 F.2d 70 (1984), and the Sixth Circuit's decision in *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964), refused to enforce the Board's order, concluding that individuals who are paid and controlled by a union that has targeted an employer for organization are not "employees" under the NLRA.

SUMMARY OF THE ARGUMENT

The NLRB's conclusion that an employer is required to hire paid union organizers of a union that has targeted that employer for organization is an unreasonable and

arbitrary interpretation of the Act. A requirement that employers must hire the paid agents of their adversary in organizing activities is at odds with the fundamental balance in the statute between the roles of employers, employees and labor organizations. In addition, the Board's requirement that employers must allow paid union operatives to work side by side with the rank and file members of a potential bargaining unit is inconsistent with numerous principles articulated under the NLRA that are designed to protect fundamental fairness and freedom of choice. The unreasonableness of the Board's rule requiring a targeted employer to hire paid organizers of the union targeting him is underscored by the Board's arbitrary distinction not applying the same rule in a strike situation, an exception unsupported by the statute and by the Board's experience in administering the statute.

Moreover, the language of the statute itself supports the conclusion that paid union organizers are not "employees" when they are acting as the paid agents of a labor organization and have presented themselves for employment to a targeted employer in furtherance of their paid organizational duties.

I. THE BOARD'S CONCLUSION THAT AN EMPLOYER IS REQUIRED BY LAW TO HIRE THE PAID ORGANIZERS OF A UNION THAT HAS TARGETED THAT EMPLOYER FOR ORGANIZATION IS AN UNREASONABLE INTERPRETATION OF THE ACT.

As the court of appeals recognized, it is settled that the Board, as the agency charged with interpreting the

NLRA, is entitled to deference in its interpretation of the statute only if that interpretation is reasonable in light of the terms, structure and policies of the Act. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where the statute is silent or ambiguous, agency's interpretation is upheld if it is a permissible construction of the statute). The NLRB is not entitled to deference, however, in a case such as the one here, where the Board unabashedly has ignored the distinct roles of employers, employees and unions carefully cast by Congress, and has articulated a rule that conflicts with numerous other provisions and principles of the statute. As we show in Section II, *infra*, there is even support in the text of the Act for the court of appeals' conclusion that paid union organizers who seek a job with a targeted employer on behalf of the targeting union are excluded from the definition of "employee." In such circumstances, it is clear that the Board's conclusion that paid union organizers must be hired by a targeted employer during an organizing drive is at odds with the terms, structure and fundamental policies of the statute.

A. The Principle of Balance Struck by Congress in the NLRA Between Labor and Management Demonstrates that an Employer is not Required to Hire the Paid Agents of the Union that has Targeted It for Organization.

Even a cursory analysis of the structure of the NLRA shows why the Board was wrong to conclude that paid union organizers who have targeted an employer for organization must be hired by that employer. By design,

employers, unions, and employees constitute three distinct groups under the NLRA. The major emphasis of the Act is to protect the rights of employees by keeping employee interests distinct from those of employers and of unions. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). The paramount employee right under the NLRA is the Section 7 right to form, join, or assist labor organizations or to refrain from doing so. 29 U.S.C. § 157. Unions and employers have the right to convince employees legitimately that they either should or should not support a union, but neither has the right to make that decision for employees. *Lechmere*, 502 U.S. at 532.

Recognizing that employee interests are best served by independent persuasion from labor and management, Congress carefully separated the roles of unions and employers under the statute and designed the NLRA to keep either from interfering with the independence of the other. There are numerous examples of the independent, and at times adversarial, roles that are delineated for employers and unions under the NLRA.

A first principle of the NLRA is that labor and management may not dictate who shall be the collective bargaining agents of the other. *See generally General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969) (discussing fundamental right of both employers and employees to choose their own bargaining representatives). Consistent with this principle, the NLRA prohibits an employer from interfering "with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2). An employer violates that section of the Act if its managers and supervisors play a meaningful role in the selection of a union as the employees' bargaining representative. *Int'l*

Assoc. of Machinists v. NLRB, 311 U.S. 72, 79-80 (1940); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 519-20 (1941). Similarly, the Act prohibits a labor organization from restraining management in the selection of its representatives. 29 U.S.C. § 158(b)(1)(B); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-335 (1981).

Further evidence of the independent and distinct roles occupied by employers and unions under the Act is that no union is required to bargain with an employer about the union's rules of membership, 29 U.S.C. § 158(b)(1)(A) (proviso); *Betra Mfg. Co.*, 233 NLRB 1126, 1135 (1977), *enf'd*, 624 F.2d 192 (9th Cir. 1980), *cert. denied sub nom, Thomas v. NLRB*, 450 U.S. 996 (1981); *NLRB v. Corsicana Cotton Mills*, 178 F.2d 344 (5th Cir. 1949); *Zayre Dep't Stores*, 289 NLRB 1183, 1186 (1988). By the same token, management is not required to bargain with a union about the individuals the employer hires, *Star Tribune*, 295 NLRB 543, 547-48 (1989); *United Technologies Corp.*, 274 NLRB 1069, 1070 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986), or about the employer's basic decisions on how it will run its business. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *See also Dubuque Packing Co., Inc.*, 303 NLRB 386 (1991), *enf'd in relevant part*, 1 F.3d 24 (D.C. Cir. 1993).

The NLRA has been construed to allow an employer to discharge its managers and supervisors who support union representation. *E.g., Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *review denied sub nom, Auto Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Similarly, a union may expel its members who aid management by working during a strike. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

Furthermore, an employer may permit its managers and supervisors to join a union, but it is not required by the Act to do so. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 n.2 (1961). At the same time, a union is not required to accept a management representative into its ranks, although it may do so voluntarily. *Id. See also Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). *Cf. Reich v. Int'l Alliance of Theatrical Stage Employees*, 32 F.3d 512, 515 (11th Cir. 1994) (observing that union's prohibition on a managerial employee-member having a voice or vote in union business appropriately avoids "a conflict of interest in [the individual] carrying out his duties for the union, on the one hand, and his employer, on the other.").

Given the foregoing principles, it is inconceivable that Congress nevertheless could have intended that an employer would be *required* to hire full-time union organizers paid and controlled by the union even though the employer knows that the organizers' express purpose in applying for jobs is to drum up support for the union. Indeed, it is apparent that the conclusion of the Board in this case is in direct conflict with core tenets of the NLRA. It is only by unreasonably equating paid union activity with the Section 7 right of employees to form, join, or assist a labor organization, and by giving no meaningful consideration to the balancing principles upon which the Act is based, that the Board could come to the remarkable conclusion that a targeted employer must hire a paid union adversary.[4]

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[4] Thus, the Board miscasts the challenge to the "employee" status of paid union organizers as an attack on the premise that

This Court, in *Lechmere, supra,* reiterated that union organizers could not use the Section 7 rights of the employees they sought to organize to excuse their trespass onto an employer's property. *Lechmere,* 502 U.S. at 537. Nonetheless, the Board concluded here that the union can assume the rights of employees by the simple expedient of directing its paid agents to apply for employment with a non-unionized company. But this dispatch of its agents to the employer's work site, employment applications in hand, no more changes the character of the union's right than if an employer sent its supervisors to apply for a job with a union and thereby attempted to vest them with "employee" status for the purpose of advancing the employer's opposition to unionization from within the union. Neither the union nor the employer should be permitted to gain

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employees can be both loyal to their union and to their employer. *Town & Country Elec.*, 309 NLRB 1250, 1257 (1992), *enf'd denied*, 34 F.3d 625 (8th Cir. 1994). In the same vein, it mischaracterizes the arguments in support of this challenge as "arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization." *Id.* 1256. The briefs of the Board and its *amici* in this Court continue this theme.

Neither of these characterizations is accurate or useful. There is no question that employees may be both loyal union adherents and loyal employees and that the right to join unions and to assist labor organizations is fundamental. Those principles are not at issue. Rather, what is at issue is whether a paid operative of a union that has targeted an employer for organization, who seeks to work for the employer to further the union's objectives, and whose duration of employment is controlled by the union's agenda, and not by the individual's or the employer's requirements, is a *bona fide* "employee" who must be hired and retained.

"employee" status for its paid agents through such stratagems.

Moreover, as the Fourth Circuit recognized in *H.B. Zachry Co. v. NLRB, supra,* the requirement that an employer accept into its ranks paid union organizers, particularly during a representation campaign, effectively requires the employer to subsidize the organizational activities of the union that, by statute, it is privileged to oppose. *Zachry,* 886 F.2d at 75. In like manner, Congress, in Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), sought to maintain the independence of unions for the benefit of employees by prohibiting employers from funding their efforts.

The Board cursorily dismisses the latter prohibition, stating that Section 8(a)(2) would not be violated by such employer "support" for the union because organizers would be paid for work performed for the employer, not for their organizing activities. *See Town & Country, supra,* 309 NLRB at 1257-58 n.36. Such analysis begs the question, however, because it ignores the statutory policy embodied in Section 8(a)(2) that in the realm of organizing, most employers and unions are adversaries – competitors for the sympathies of the employees. No competitor should effectively be *required* to subsidize the competition. Yet, the decision of the Board ignores logic and the very fabric of the NLRA by requiring such an untoward result.

In sum, the basic structure of the Act clearly supports the conclusion that the paid organizers of a union that has targeted an employer for organization need not be

hired by that employer, whatever their technical status under the Act.[5]

B. Other Settled Principles of the NLRA are Violated by the Board's Conclusion that the Pay and Control Exercised by a Union Over Its Organizers do not Present Disabling Conflicts of Interest.

The erroneous nature of the Board's decision in this case is highlighted by its decision in *Sunland Construction Co.*, 309 NLRB 1224, 1230-31 (1992), a companion case to

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[5] The Board and its *amici* argue that NLRA Section 2(3)'s broad definition of "employee," when considered in light of the list of exclusions set forth therein, mandate that "paid union organizers" be classified as statutory employees, given that they allegedly are not among the groups expressly excluded. Petitioner and its *amici* base this contention on the "expressio unius est exclusio alterius" principle of statutory construction, that is, the inclusion of one thing negatively implies the exclusion of others. As we show in Section II, the text of the Act supports the proposition that paid union organizers are excluded from the Act by operation of Sections 2(2) and 2(3). Yet, even were this not the case, other categories of workers have been determined to be outside the protection of the Act despite their absence from Section 2(3)'s list of exclusions. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (holding, contrary to the Board's conclusion, that all managerial employees are excluded from Section 2(3)'s definition of employee); *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976) (holding that medical residents and medical interns are excluded from the NLRA definition of employee). Thus, even if Congress failed to expressly exclude "paid union organizers" from Section 2(3), this is not dispositive of Congress' intent on the issue, particularly where, as here, a contrary result is inconsistent with the fundamental policies of the statute.

Town & Country before the Board. In *Sunland*, the Board held that an employer may refuse to hire a paid union organizer during a strike without violating the NLRA. The Board reasoned that the conflict of interest between the employer and the union justified the employer's refusal to hire the organizer based upon his paid union status, saying: "[the union agent's] interest and objectives . . . were [presumptively] aligned with the Union – on whose behest he acted." *Id.* at 1231. Emphasizing the point, the Board also noted that an employer could not presume that *unpaid* union adherents who applied to work behind a picket line operated under such a disabling conflict "because they are not obligated to the union as paid agents." *Id.* n.41.[6]

The paradox is that in *Sunland*, the Board acknowledged that a fundamental divergence of interests exists between unions and employers. According to the Board, an employer is privileged to presume that the union's motive is illicit and at odds with the employer's desire to operate when the union sends its agents into the employer's workforce during a strike. In such an instance, the employer need not hire an applicant who is a paid union organizer. Inexplicably, however, the Board would forestall an employer targeted by a union for organization from drawing a negative inference about the union's motives in sending its paid operatives to work for the employer in the absence of a strike.

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[6] In *Sunland*, the Board, as in this case, found paid union organizers to be Section 2(3) "employees." In this respect, the Board's conclusions in the cases cannot be reconciled.

The Chamber submits that the Board's demarcation between a strike situation and a non-strike (organizing) situation is utterly untenable. For example, if paid union organizers must be hired by a targeted employer before a picket line is erected as the Board holds, then all a union need do is send its agents to apply for work before a strike is called, and if qualified for the job, they must be hired by the employer. Presumably, the union could then call a strike, instruct its operatives to continue to work behind the picket line, and the Board, predicated on *Sunland*, would then permit the targeted employer to terminate the same paid organizers who, under the Board's doctrine in this case, the employer was compelled to hire originally. A similar absurd result follows that paid union organizers may be discharged if they, at the union's direction or urging, engage in lesser forms of economic activity against the employer, such as a protected "sit-down" strike. *See Overhead Door Corp.*, 220 NLRB 431 (1975) (finding employees' refusal to leave plant at the end of shift to protest change in working hours to be protected conduct), *enf'd denied in relevant part*, 540 F.2d 878 (7th Cir. 1976). *See also Peck, Inc.*, 226 NLRB 1174 (1976) (affirming continued adherence to rule in *Overhead Door*). It does violence to the Act to permit the irreconcilable conflict between paid union organizers and targeted employers to be acted upon only in the strike situation.[7]

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[7] Thus, the Board's distinction requires it to disregard that striking is protected activity under Section 7 of the Act, 29 U.S.C. § 157; that under Section 2(3) of the Act, "employees" do not lose their status by exercising their right to strike, 29 U.S.C. § 152(3); *see also Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); and that nothing in the NLRA "shall be construed so as either to interfere with or impede or diminish in any way the right to strike," 29 U.S.C. § 163. Similarly, both employers and unions are prohibited under the Act from discriminating against employees who exercise their right to strike. 29 U.S.C. §§ 158(a)(1), 158(b)(1)(A). It is precisely because fundamental employee rights under the Act must be disregarded in order for the Board's distinction to work that the Board was wrong to conclude that a paid union organizer is a *bona fide* applicant or employee of a targeted employer at *any* time.

In contrast with the Board, the administrative law judge in the *Sunland* case[8] realistically recognized that conflicting agendas are equally possible in both the strike and the organizing context:

> It is not farfetched to regard the [union's] "strike back" strategy as built upon a form of entrapment reminiscent of other "blackmail" devices which in 1958 led to enactment of the Section 8(b)(7) strictures on recognition picketing. . . . [In this case], the employee protections of Section 8(a)(3) were central ingredients of a scheme whereby an unorganized employer would be pressured to capitulate, go out of business, or face recurring union sponsorship of mass applications in the midst of future projects. From my perspective, a serious question arises as to whether, through the complaint in this proceeding, the Board has been conscripted as

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[8] In *Sunland*, the Board disavowed reliance on the administrative law judge's discussion of the motives of the union in inundating the employer with applications of union organizers. Yet, the ALJ's candid assessment is entitled to much weight, because it demonstrates the falsity of the distinction that the Board would draw between the strike situation and "business as usual."

> an unwitting conspirator in the effort to achieve union goals – be they organizational or economic – through pressures, rather than through the statutory procedures designed to assure that compulsory bargaining begins with procedures preserving freedom of choice.

Sunland Constr. Co., 309 NLRB at 1245 (decision of ALJ Harmatz).[9]

By acknowledging that the control exercised by the union over its organizers makes them different in kind from other laborers in the strike context, but then failing to account for those differences in the organizing context, the Board clearly reaches an unreasonable interpretation of the Act. For in each case, unions and employers should properly be viewed as "separate factions in warring camps." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947). Just as an employer need not hire a paid union organizer to work behind a picket line, so too an employer should have a right to refuse to hire – and, therefore, not to pay – individuals who are concurrently employed by a union adversary to enter the employer's workplace for the express purpose of furthering the union's interests at the location. *Cf., e.g., Lucky Stores, Inc.*, 269 NLRB 942 (1984) (permissible to terminate a confidential employee based on the presumption that close marital or social relationship to a union adherent might

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[9] ALJ Harmatz recognized the particular vulnerability of a construction employer to this tactic if he is targeted by a union when nearing his contract deadline to complete a job, because normally such contractors are subject to stiff monetary penalties for delay. 309 NLRB at 1245.

improperly disclose confidential labor relations information to union); *Joseph Schlitz Brewing Co.*, 211 NLRB 799 (1974) (same).

A conclusion that an employer need not hire a paid union organizer who only will remain with the employer so long as the union permits him to do so is consistent not only with the NLRA, but also accords with common law agency principles, which recognize that such divided loyalty is inconsistent with the normal master-servant relationship. *See* Restatement (Second) Agency § 226, comment a ("giving service to two masters at the same time normally involves a breach of duty by the servant to one or both."). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 1349 (1992) (observing that construing the employer-employee relationship under the NLRA "to imply something broader than the common-law" thwarts congressional intent); H.R. Rep. 245, 80th Cong., 1st Sess. at 18 (1947), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1947, 309 (admonishing courts to apply the common law rules when construing the master-servant relationship under the statute because "Congress . . . intends . . . that the Board give to words not far-fetched meanings but ordinary meanings").

What the Board seemingly fails to comprehend is that where union pay and union control motivate the organizer's conduct, the organizer is acting as an agent of the employer's adversary, not as a run-of-the-mill pro-union employee. As such, irrespective of whether a paid union organizer technically falls within the NLRA definition of "employee," a targeted employer should be privileged to refuse to hire the union agent on the presumption that the

union's conflicting interests ultimately will be given precedence. *Cf. Emanuel Hospital*, 268 NLRB 1344, 1348 (1984) ("suspicion, doubt or fear" that employee with potential conflict of interest will act in derogation of employer's interest is sufficient basis to take action against employee). *Cf. also Wild v. United States Dep't of Housing and Urban Dev.*, 692 F.2d 1129, 1133 (7th Cir. 1982) (where employee's off-duty behavior is in conflict with employer's mission, employer could reasonably terminate him, as, for example, "[i]f a union officer of a musicians' union owned a nightclub that employed non-union musicians"). To conclude otherwise, as did the Board in this case, is to exalt form over substance and to ignore the realities of the workplace.

Additionally, determining that an employer need not hire the paid organizers of a union safeguards the right of *bona fide* employees to freely choose whether or not they wish to be represented by a union. It cannot be disputed that the right to take part in free and fair elections is crucial to realization of the Section 7 right to organize or to refrain from organization. This right is necessarily impaired by the Board's construction of the statute in this case because, under the Board's view, paid union organizers might well be permitted to vote in a representation election brought by the union paying them. *See Dee Knitting Mills*, 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975). Thus, the Section 7 rights of legitimate employees clearly are threatened by the Board's rule.

Yet, even if paid union organizers were to be excluded from such an election, there is harm to the *bona fide* employees' section 7 rights merely through the thrusting of the paid union agents among their ranks. For,

moving about in the guise of rank and file employees, the paid union agents are apt to "paint a false portrait of employee support during the representation campaign." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277 (1973). The results of the election may be tainted thereby. Moreover, it is well recognized that employees who are choosing whether or not to be represented by a union are entitled to know the character and scope of the unit in which they will be included. *See, e.g., NLRB v. Parsons School of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986); *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1301 (9th Cir. 1985). If paid union organizers populate the ranks of a targeted workforce in sufficient numbers, in addition to the false portrait of support that they will paint, they will distort the character and scope of the actual bargaining unit and bargaining unit employees likely will become confused about the role of "employee" organizers in the collective bargaining process.

On the other hand, a holding that paid union agents, like Hansen, do not have the right to engage in paid organizing at an employer's workplace is not tantamount to permitting employers to discriminate against *bona fide* employees who engage in union activity. Nor will it chill the rights of such employees to form, join, and assist labor organizations. *Bona fide* employees, who have a stake in the employer's enterprise, and who will endure the consequences of whatever representation choice is ultimately made by the employee group, will still enjoy all of the rights afforded them under the NLRA. Unions still will be able to appeal legitimately to employees within the broad parameters permitted by the Act. Unions simply will not be able *to require* employers to

subsidize their position by the forced employment of individuals whose interest in and loyalty to the employer is dictated by the union's agenda.

II. PAID UNION ORGANIZERS ARE NOT "EMPLOYEES" UNDER THE LANGUAGE OF SECTION 2(3) OF THE ACT.

Where a statute is clear, the agency charged with interpreting it is bound to apply it as written and the reviewing court, in turn, should accord no deference to an agency's determination. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (reasoning that where Congress has spoken on the precise issue, deference is inappropriate); *NLRB v. Hearst Pub., Inc.*, 322 U.S. 111, 130-31 (1944) (same). *Cf. Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is").

The Chamber submits the text of the NLRA supports the Eighth Circuit's conclusion that paid union organizers are not "employees" when they present themselves for employment to a targeted employer. The Chamber believes that paid union organizers are excluded from NLRA Section 2(3) when they act in this capacity. Accordingly, the Board's contrary interpretation of the NLRA is a misreading of the statute and is entitled to no deference by the Court.[10]

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[10] Although the Brief of Local 292 on the merits (note 17 therein) disingenuously implies that the Board's position on the employee status of paid union organizers dates back to the

Section 2 of the NLRA, defines, *inter alia*, the terms "employer," "employee" and "labor organization." Each entity is recognized as distinct and apart from the others

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1930s, the Board cannot be said to have announced its position on the status of that group until the 1960s, in a footnote that the Board candidly described as *dictum* in *Sears, Roebuck and Co.*, 170 NLRB 533, 535 n.3 (1968), stating "[a]s long as the employee gives a full day's work to his 'regular' employer, the fact that he renders services in other hours to the Union does not affect his employee status, whether such latter services are paid or not." *See also Elias Bros. Big Boy, Inc.*, 139 NLRB 1158, 1165 (1962) (Board adopting without opinion the ALJ's recommended decision in which he concluded that, on the facts presented, a waitress who received a nominal sum from the union for expenses incurred in organizational efforts did not thereby lose her employee status), *enf'd denied in relevant part*, 327 F.2d 421 (6th Cir. 1963). In *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975) (unpublished opinion), and *Oak Apparel, Inc.*, 218 NLRB 701 (1975), the Board definitively held paid union organizers to be protected "employees" under Section 2(3), even if they were working for an employer for the express purpose of organizing that employer's employees. The Board has adhered to this interpretation, *see Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985); *Palby Lingerie, Inc.*, 252 NLRB 176 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879 (1979); *Henlopen Mfg. Co.*, 235 NLRB 183 (1978), *enf'd denied on other grounds*, 599 F.2d 26 (2d Cir. 1979); *Anthony Forest Products Co.*, 231 NLRB 976 (1977), and, in light of this Court's decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), has extended it to include paid union organizers who apply for work with the objective of organizing an employer. *E.g., Escada (USA), Inc.*, 304 NLRB 845 (1991), *enf'd without opinion*, 970 F.2d 898 (3d Cir. 1992); *Willmar Elec. Serv., Inc.*, 303 NLRB 245 (1991), *enf'd*, 968 F.2d 1327 (D.C. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1252 (1993); *H.B. Zachry Co.*, 289 NLRB 838 (1988), *enf'd denied*, 886 F.2d 70 (4th Cir. 1989).

by the language of the definitions. In Section 2(2) of the Act, the term "employer"

> includes any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, *or any labor organization (other than when acting as an employer)*, or anyone acting in the capacity of officer or agent of such organization.

29 U.S.C. § 152(2) (emphasis added).

The definition of "employee" is set out in Section 2(3) and states

> the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . *but shall not include any individual employed* as an agricultural laborer, or in the domestic service of any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or *by any other person who is not an employer as herein defined*.

29 U.S.C. § 152(3) (emphasis added).[11]

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[11] Section 2(5) defines a "labor organization" as

> any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5). While the Act defines a labor organization as comprised of employee-members, as this Court has emphasized, a labor organization has an identity distinct from that of its constituents. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

As the foregoing demonstrates, the definitions of these terms are interrelated and refer to each other. While the term "employee" is defined broadly, the term expressly excludes anyone who is employed "by any other person who is not an employer" as defined by the Act. Similarly, although the term "employer" is broad, it contains a number of exclusions, including one for a "labor organization." Through these two interrelated exclusions, Congress has spoken: individuals who are paid employees of a labor organization – including paid union organizers – are *not* "employees" under the NLRA because they are carrying out the union's organizational work.

The parenthetical to Section 2(2), which states that a union is an employer when it is "acting as an employer," confirms the conclusion that a union's agents are not "employees" when acting as a labor organization, that is attempting to organize an employer, like Town & Country. Indeed, this parenthetical statement was added for the limited purpose of subjecting labor organizations to the strictures of the NLRA in their treatment of their own employees. *See* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (stating that "[i]n its

relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides."). *See also Office Employees Int'l Union v. NLRB*, 353 U.S. 313, 316 (1957) (holding Teamsters to be employer liable for unfair labor practices in interfering with right of its clerical employees to organize themselves). Congress understood that any broader application of "employer" status to labor organizations would "deprive unions of one of their normal functions," namely, organizing *other* employers. S. Rep. No. 573, 74th Cong., 1st Sess. 6 (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935, 2300, 2305. *See also* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (distinguishing between a union's relations with its "clerks, secretaries and the like" and its actions as an advocate of unionization).

Thus, Congress drew a sharp distinction between the union in its relationship with its own employees regarding wages, hours, and terms and conditions of employment and the union's organizing activities of other employers. The union, in short, was to be an "employer" only in the limited context of its relations with its *own* employees. Paid agents of labor organizations were intended to be statutory "employees" only when dealing with their own employer, the union, *not* when dealing with some other employer whom the union has targeted for organizing.

The Board, responding to this analysis, asserted that it was "immaterial" whether a union is a statutory employer because the paid union organizer draws his "employee" status from his attempted employment with

the targeted employer. *Town & Country, supra*, 309 NLRB at 1257-58 n.36. In support of this proposition, the Board drew an analogy between the union organizer and an agricultural or government worker (neither of whom is an "employee" under Section 2(3) of the Act) who seeks work with an "employer covered by the NLRA" and thus becomes an "employee vis-a-vis that new employer." The Board's summary conclusion, however, ignores the policies underlying the NLRA and the facts of the case under consideration. Thus, as a matter of fact, the paid union organizers in this case, including Hansen, who applied for work with Town & Country at the behest of the union, could only work at Town & Country in furtherance of the union's organizational goal, could only work for Town & Country so long as the union permitted them to do so, and were to be paid for fulfilling these obligations.[12] By contrast, the typical agricultural or federal employee seeking a second job does not labor under such restrictions, nor is he paid by his agricultural or federal employer for his outside efforts. Furthermore, as discussed above in Section I, as a matter of NLRA policy, Congress has struck a delicate balance between employers, unions and employees. This balance is destroyed when paid agents of labor organizations who apply for work in order to further their union's objectives

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[12] Indeed, while Mr. Hansen received $725 from Ameristaff, the employment agency retained by Town & Country to help it staff the project, he was additionally paid nearly $1,100 by the union for his concurrent organizational efforts. *See Town & Country, supra*, 34 F.3d at 629 n.2.

are deemed indistinguishable from any employee who seeks a second job.[13]

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[13] The Board and its *amici* also look to Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, as evidence that paid union personnel could be both employees of unions and of targeted employers such as Town and Country. *See Town & Country, supra*, 309 NLRB at 1257-58 n.36. Section 302 restricts payments that an employer can legally make to an employee representative, but excludes payments "to any representative of his employees, or any officer or employee of a labor organization, who is also an employee . . . of such employer, as compensation for or by reason of his service as an employee of such employer." 29 U.S.C. § 186(c)(1). The Chamber submits that there is a difference between Section 302, which *permits* an employer to employ a union official if it wishes to do so without being guilty of bribery under the LMRA, and the Board's decision in this case, which *requires*, an employer to employ the paid union agent. Furthermore, the Board's logic in this regard is no more persuasive than that rejected by this Court in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170-71 (1971), that retirees are "employees" under the NLRA because of their employee status under Section 302(c)(5) of the LMRA. 29 U.S.C. § 186(c)(5). There, the Court found there to be

> no anomaly in the conclusion that retired workers are "employees" within § 302(c)(5) entitled to the benefits negotiated while they were active employees, but not "employees" whose benefits are embraced by the bargaining obligation of § 8(a)(5).

Id. at 170. So too here, there is no anomaly in Congress permitting employers and unions willingly to enter into agreements whereby union officials could be recognized as paid "employees" of the employer without violating the bribery statute, while at the same time *excluding* such individuals from the NLRA definition of "employees" whom employers *must* consider for hire without regard to their concurrent union employment for the express purpose of organizing that employer.

If the language of the statute is examined closely, it is clear that neither Hansen and his cohorts, nor the two paid union officials who applied for work at Town & Country, should be considered statutory employees when they sought a job with the Company to organize its workforce. When these paid union organizers apply for work in order to organize an employer, and are paid by their union to do so, they are carrying out duties as the union's agents vis-a-vis that employer – duties that bring them outside the ambit of protections provided to "employees" under the NLRA. Lacking "employee" status, they, like any other non-employee, could be rejected or dismissed by a targeted employer without violating the NLRA. *Cf. Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963), *aff'd on other grounds sub nom., United Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964) (loss of "employee" status under the NLRA means loss of the Act's protection and an employer's motive for discharging those who have forfeited this status – including its otherwise unlawful desire to rid itself of the employees' union – is immaterial). In this respect, a paid union organizer is similar to a company supervisor who is also excluded from the definition of "employee" under Section 2(3) of the Act, and who may be discharged because of his union activities or sympathies. *See, e.g., Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *review denied sub nom., Auto Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

The Board's disregard of statutory language consistent with the separate and diverse roles of employers and unions has led to the erroneous and paradoxical conclusion that the paid agents of one are "protected," and

therefore must be "hired" by the other. Such an intolerable result must be rejected, and its conclusion that paid union organizers are Section 2(3) "employees" set aside.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America urges the Court to sustain the Eighth Circuit's judgment.

Respectfully submitted,

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Dated: April 1995